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IN THE
COURT OF APPEALS OF INDIANA

MARK LAFOREST and MARCIA LAFOREST,	)	
	)	
Appellants-Plaintiffs/	)	
Counterclaim-Defendants,	)	
	)	
vs.	)	No. 71A03-0601-CV-53
	)	
ROSEMARK HOMES OF SOUTH BEND, INC.	)	
	)	
Appellee-Defendant/	)	
Counterclaim-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-9806-CP-830

May 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a remand from this court on a claim for breach of contract, Mark LaForest ("Husband") and Marcia LaForest ("Wife") (collectively the "LaForests") appeal the trial court's award of damages to Rosemark Homes of South Bend, Inc. ("Rosemark"), raising the following issues:

I. Whether the trial court on remand erred in awarding damages where there was insufficient evidence that the damages were the natural, foreseeable, and proximate result of the LaForests' breach of contract.

II. Whether the trial court on remand, which was presided over by a judge other than the original trier of fact, erred by failing to conduct an evidentiary hearing for the purposes of calculating and itemizing Rosemark's damages.

III. Whether the trial court on remand erred in scheduling a hearing to determine Rosemark's appellate attorney fees.

Rosemark, in turn, counterclaims and raises the following issue:

IV. Whether the trial court on remand erred by omitting closing costs in the form of realtor fees and real property taxes from Rosemark's damage award.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this case. This court's prior memorandum decision was rendered on September 29, 2003, and set forth the underlying facts as follows:

> In the spring of 1997, Husband's employer reassigned him from New Jersey to South Bend, Indiana. Wife remained in New Jersey until Husband found a new home. In late June 1997, Husband discussed with Rosemark vice president Mike Everett a four-bedroom home that was to be built on lot number 56 in Westwood Hills and featured in a builders' showcase in September 1997. Husband toured a similar four-bedroom home built by Rosemark and sent pictures and plans to Wife.

> The LaForests requested several modifications to the original plan, including the transformation of a fourth bedroom into an open loft. On July 13, 1997, the LaForests and Rosemark signed a construction agreement and general building specifications, which incorporated the modifications and specified that the home was to be ready for possession on September 24, 1997. The agreement also required that any additions or changes be made in writing. On August 5, 1997, the LaForests satisfied the down payment requirement of $24,170.00.
>
> During the construction of the home, the LaForests objected to the following: the siding was Brentwood vinyl instead of Barkwood vinyl; the chimney chase was made of one-half brick laminate instead of full brick; Rosemark did not install a plastic air barrier over the insulation in the basement; Rosemark constructed a different style of front porch than that specified by the contract; and Rosemark constructed a different style of screened porch and deck than that specified by the contract. Rosemark and the LaForests discussed each of these changes. The LaForests orally approved these changes but refused to sign written reductions of these changes. In early September 1997, the LaForests learned that Rosemark had installed a septic tank approved for a three-bedroom home. On September 24, 1997, the LaForests provided Rosemark with a list of complaints. When no agreement was reached, the LaForests refused to purchase the home.
>
> On June 17, 1998, the Laforests filed a complaint alleging conversion, seeking recovery of earnest money [in the amount of $24,170.00] paid on the contract for construction of the home, and giving notice of lis pendens against the subject property. On August 24, 1998, Rosemark filed its reply, counterclaim, and motion to dismiss the conversion claim and lis pendens notice. Rosemark's counterclaim sought "damages for loss of income, costs incurred for maintaining the property, costs associated with the re-sale of the home, and other expenses incurred due to the breach."[1] . . . In April 2001, the trial court released $24,170.00 from an escrow fund to Rosemark.

LaForest v. Rosemark Homes of South Bend, Inc., No. 71A03-0212-CV-429, slip op. at 2-4 (Ind. Ct. App. Sept. 29, 2003); *Appellant's App.* at 15-17.

[1] Rosemark requested total damages in the amount of $79,165.71, which, in part, consisted of $21,135.85 for loss of income from the sale of the house, $17,482.25 in interest payments on the mortgage for the property, $13,577.75 in attorney fees, builders' insurance, maintenance and landscape expenditures.

The matter was tried to the bench, and on June 4, 2002, the trial court entered judgment finding for Rosemark both on the LaForests' complaint and on Rosemark's counterclaim. Without itemizing Rosemark's damages, the trial court awarded Rosemark $10,188.12 in damages, which when added to the $24,170.00 that Rosemark had previously been paid totaled $34,358.12. Rosemark filed a motion to correct error seeking to modify the order from $10,188.12 to $54,995.71, arguing that the latter amount was the actual loss it had incurred. This modification would have awarded Rosemark $79,165.71 in damages.

Two days later, the LaForests also filed a motion to correct error seeking to vacate and modify the judgment against them and contending that Rosemark failed to build the home in accordance with the construction specifications, which released them from the obligation to purchase the home. Following a hearing, the trial court denied both motions.

In September 2002, the LaForests appealed, and Rosemark filed a cross-appeal. In a memorandum decision dated September 29, 2003, this court affirmed the trial court's judgment against the LaForests in the breach of contract claim and affirmed the trial court's decision to enter damages in favor of Rosemark. However, finding that the damage award was outside the scope of the evidence, our court ordered the case remanded for recalculation and itemization of damages. The LaForests filed a petition for rehearing, which our court denied. Thereafter, on April 1, 2004, our Supreme Court denied the LaForests' petition to transfer.

On remand, with a different judge presiding, the trial court entered findings of fact and conclusions thereon and awarded Rosemark $36,401.69. This amount was in addition to the $24,170.00 that Rosemark had been previously paid, for a total payment of $60,571.69. The

LaForests now appeal, and Rosemark counterclaims. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Damages

The LaForests challenge the trial court's order on remand to pay Rosemark $36,401.69 in damages. Our review of an award of damages is limited. *J.E. Stone Tree Service, Inc. v. Bolger*, 831 N.E.2d 220, 227 (Ind. Ct. App. 2005). We do not reweigh the evidence or judge the credibility of witnesses, and we will consider only the evidence favorable to the award. *Id.*; *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 101 (Ind. Ct. App. 1999), *trans. denied*. A damage award must be supported by probative evidence and cannot be based on mere speculation, conjecture, or surmise. *Bolger*, 831 N.E.2d at 227.

A party injured by a breach of contract is limited in its recovery to the loss actually suffered, and may not be placed in a better position than it would have enjoyed if the breach had not occurred. *Id*. Thus, a damage award must be referenced to some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances. *Abbey Villas*, 716 N.E.2d at 101 (citing *4-D Bldgs., Inc. v. Palmore*, 688 N.E.2d 918, 921 (Ind. Ct. App. 1997)). We will reverse an award only when it is not within the scope of the evidence before the finder of fact. *Id*.

In our September 29, 2003 memorandum decision, a panel of this court noted:

> Rosemark identifies six categories of damages and corresponding evidence to justify its claim for additional compensation. [sic] "(1) loss of income from the original purchase price and the resale value; (2) maintenance of the property costs; (3) payment of interest on loans for builder financing; (3) [sic] insurance; (4) tax liability; (5) costs associated with the February 1999 closing; and (6) attorneys fees." Appellee's Br. at 12. After subtracting the $24,170.00 already granted to Rosemark, the remaining damages calculated by Rosemark total $54,995.71.
>
> We take issue with the inclusion of the February 1999 closing costs, because Rosemark would have incurred similar costs even if the LaForests had purchased the home. The remaining damages, however, are supported by the evidence and are the natural, foreseeable, and proximate consequence of the LaForests' breach. Although we do not endorse the precise amount that Rosemark requests, we do agree with its contention that its damages award is clearly outside the scope of the evidence. We therefore remand with instructions to recalculate Rosemark's damages consistent with this opinion.

LaForest, slip op. at 7-8; *Appellant's App.* at 20-21.

On remand, the trial court itemized Rosemark's requested damages as follows:

a. Maintenance Costs, totaling $4,895.01:
   - $483.45 in payments [for electricity] from 10/17/96 thru 2/20/99.
   - $892.57 in payments [for gas] from 10/7/97 thru 2/26/99.
   - $2,469.00 in landscape maintenance from 3/1/98 thru 10/31/98.
   - $582.87 in housecleaning from 1/20/98 thru 2/24/99.
   - $430.00 in interior touch-up work on 4/8/98 and 10/9/98.
   - $ 37.12 for light bulbs and other maintenance supplies.

b. Payment of Interest on Loans for Building Financing by James R. Lewis, totaling $17,482.25:
   - $17,482.25, which represents Standard Federal Loan Interest from 10/1/97 thru 2/1/99.

c. Insurance Costs, totaling $1,110.78:
   - $1,110.78 in payments made to Builder's Risk Insurance from 10/1/97 thru 2/26/99.

d. Tax Liability, totaling $929.00:
   - $929.00 in additional taxes owed by James R. Lewis due to loans.

e. Loss of Income due to Resale, totaling $21,135.85:
   - $21,135.85, representing the original contract price plus agreed extras ($251,135.85) less the sale price on 2/26/99 ($230,000.00).

f. Litigation Expenses, totaling $15,018.80
   - $13,577.75 in trial attorney's fees
   - $275.55 (representing one-half of . . . mediator fees).
   - $756.00 in deposition costs to St. Clair Court Reporting.
   - $109.50 in deposition costs to Holle and Associates.
   - $300.00 in bookkeeping (accounting) fees.

g. Closing Costs, totaling $18,594.02:
   - $18,594.02 representing the closing costs when the house was sold on 2/26/99.

The foregoing expenses total the sum of $79,165.71.

Appellant's App. at 10-11. Thereafter, the trial court awarded Rosemark all of its claimed damages, with the exception of the closing costs that our court had previously ruled to be improper. The damage award was $60,571.69, but, since the LaForests had already paid $24,170.00, the trial court ordered the LaForests to pay $36,401.69. We consider separately each element of the trial court's damage award.

The trial court found probative evidence that Rosemark: (1) incurred $21,135.85 in damages "due to resale," which was the difference between the original price of $251,135.85 minus the February 1999 sale price of $230,000.00; (2) incurred $17,482.25 in mortgage interest expenses;[2] and (3) expended $1,110.78 in insurance costs. The trial court also found that, under the terms of the construction agreement, Rosemark was entitled to recover

[2] We note that while statutory pre-judgment interest here may have been a more appropriate measure of interest damages, statutory pre-judgment interest would exceed this amount. *See* IC 24-4.6-1-103.

attorney fees in the amount $13,577.75. After carefully reviewing the record before us, we agree that these damages were within the scope of the evidence presented on remand.

The trial court also found probative evidence that Rosemark was entitled to damages of $4,894.01 for maintenance costs and litigation costs of $1,441.05. After reviewing the record before us, we find that the evidence supports the award of $3,370.02 in maintenance costs[3] and $1,141.05 in litigation expenses.[4]

Finally, the trial court allowed damages in the sum of $929.00 for additional personal taxes owed by James R. Lewis, a principal in Rosemark. We disallow such damages because they are neither explained nor documented in the record, nor were they shown to be reasonably foreseeable or otherwise within the contemplation of the parties at the time they entered into their contract.

II. Hearing on Remand

The LaForests next contend that the trial court on remand abused its discretion by failing to order a new trial on the issue of damages. Indiana Trial Rule 63(A) allows a successor judge to perform any post-trial duties that the judge who conducted the trial or hearing could have performed. However, there are instances in which the successor judge's failure to preside at trial renders him ill-equipped to perform the functions of the regular trial judge. *Holmes v. Holmes*, 726 N.E.2d 1276, 1281 (Ind. Ct. App. 2000), *trans. denied*. T.R.

[3] Specifically, we disallow the expenses for light bulbs of $37.12 (because the invoice was dated after the date of resale of the residence and this discrepancy is unexplained in the record); paint touch-up costs of $430.00 since there is no explanation why these costs would not have been covered by warranty; landscaping charges of $554.00 for removing dead trees and the planting of new trees, shrubs, and flowers since these costs are unexplained in the record; and cleaning costs of $402.87 since they are disproportionate and unexplained in the record.

63(A), therefore, also contemplates, "if [a judge] is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial or new hearing, in whole or in part." *Id*. "In these instances, the discretion to conduct a new hearing or trial 'is a privilege allowed a judge within the confines of justice to decide and act in accordance with what is fair and equitable.'" *Id*. (quoting *Urbanational Developers, Inc. v. Shamrock Eng'g, Inc.*, 175 Ind. App. 416, 420-21, 372 N.E.2d 742, 746 (1978)).

Here, at the request of the LaForests' counsel, the trial court on remand held a hearing to allow counsel for each party to explain why claimed damages should or should not be allowed. This hearing resulted in a twenty-five-page transcript. Thereafter, the trial court based its determination of damages on guidance from our court's memorandum decision, exhibits from the original trial, and the information he obtained during the hearing on remand. Further, in the interest of efficiency, it was reasonable for the trial court to have the attorneys review the evidence concerning damages rather than allow the individual parties to testify. The trial court acted within its discretion when it decided on a damage award without holding a new trial. *Id*.

III. Attorney Fees

The LaForests contend that the trial court erred in scheduling a hearing for the purpose of determining Rosemark's appellate attorney fees for the 2003 appeal when Rosemark failed to request an award of appellate attorney fees in either the trial court or this court prior to our 2003 decision. Rosemark counters that, because the construction agreement provides for an

[4] We disallow the bookkeeping expense of $300.00, which is not explained in the record.

award of attorney fees to the prevailing party, it is also entitled to appellate attorney fees. *Appellee's Brief* at 16.

"'The general rule in Indiana and other states is that each party to litigation must pay his own attorney fees. However, an award of attorney fees may be authorized by contract, rule, statute, or agreement.'" *Marion-Adams School Corp. v. Boone*, 840 N.E.2d 462, 467 (Ind. Ct. App. 2006) (quoting *Morgan County v. Ferguson*, 712 N.E.2d 1038, 1043 (Ind. Ct. App. 1999) (citation omitted)). Here, the construction agreement provided, "Should any litigation be brought regarding the Project or this Construction Agreement, the Contractor is entitled to recover his attorney fees from the Buyer, should he prevail." *Appellant's App.* at 100. For many years, our court denied appellate attorney fees in cases where attorney fees were provided for in a contract provision. *Seibert v. Mock*, 510 N.E.2d 1373, 1378 (Ind. Ct. App. 1987). "We viewed an award of attorney fees as merged in the judgment and not available for appellate fees." *Id*. (citing *McCormick v. Falls City Bank*, 57 F. 107 (7th Cir.1892)).

"More recently, we have recognized the parties to such a contract intended to indemnify the injured party and have excepted appellate attorney fees from the general rule of merger on equitable principles." *Id*. (citing *Radio Distrib. v. Nat'l Bank & Trust*, 489 N.E.2d 642, 649 (Ind. Ct. App. 1986)). The preferred procedure for requesting appellate fees is to timely file a petition for allowance of attorney fees with the trial court after appellate proceedings have initiated. *Vazquez v. Dulios*, 505 N.E.2d 152, 154 (Ind. Ct. App. 1987). Without citation to authority, the LaForests contend that, to be timely filed, the petition for

attorney fees must also be filed prior to the appellate court having rendered its opinion. We find no support for this contention.

Indiana Appellate Rule 67 provides for the assessment of costs on appeal. *Indiana CPA Soc'y, Inc. v. GoMembers, Inc.*, 777 N.E.2d 747, 752-53 (Ind. Ct. App. 2002); *Commercial Coin Laundry Systems v. Enneking*, 766 N.E.2d 433, 442 (Ind. Ct. App. 2002). "'Costs' include the filing fee, the cost of preparing the Record on Appeal, postage, and 'additional items as permitted by law.'" *Indiana CPA Soc'y*, 777 N.E.2d at 753 (quoting App. R. 67(B)). As such, attorney fees are sometimes permitted under this rule. *Id*.; *Enneking*, 766 N.E.2d at 442.

Appellate Rule 67(A) provides: "Upon a motion by any party within sixty (60) days after the final decision of the Court of Appeals or Supreme Court, the Clerk shall tax costs under this rule." While recognizing that attorney fees are not always considered costs, we find persuasive the timing set forth in this rule. By the LaForests' own admission, Rosemark, "did not request appellate attorney fees until it filed its request for hearing on October 3, 2003, four days after this Court rendered its opinion and remanded the case to the trial court." *Appellant's Brief* at 29. As such, the trial court was within its discretion to conclude that appellate attorney fees could be awarded. The trial court did not err in deferring the consideration of appellate attorney fees until this matter is returned to the trial court's jurisdiction on remand.

IV. Closing Costs

Rosemark finally contends that the trial court erred in omitting from its damage award closing costs in the form of realtor fees and real property taxes. Specifically, Rosemark

argues that it would not have incurred the realtor fee and property taxes if the LaForests had not breached the contract. In their response to Rosemark's cross-appeal, the LaForests counter that the law of the case bars Rosemark's argument. We agree.

The LaForests argue that our court's September 29, 2003 determination that closing costs were excluded from the calculation of damages was the law of the case. "Under the law of the case doctrine, an appellate court's determination of a legal issue is binding both on the trial court on remand and on the appellate court on a subsequent appeal, given the same case with substantially the same facts." *Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Servs., Inc.*, 834 N.E.2d 1116, 1125 (Ind. Ct. App. 2005), *trans. denied* (2006) (citing *Montgomery v. Trisler*, 771 N.E.2d 1234, 1238 (Ind. Ct. App. 2002), *trans. denied*). To invoke the law of the case doctrine, matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion.

In our 2003 memorandum decision, we determined that closing costs would not be included in the claimed damages. Rosemark, however, failed to appeal our decision that closing costs were excluded from the damage award. As such, our court's determination on closing costs was left unchallenged. While recognizing that the law of the case doctrine is discretionary, we fail to find any extraordinary circumstance that could persuade us to revisit the already decided issue of closing costs and hold Rosemark may not recover closing costs here.

Affirmed in part, reversed in part, and remanded.[5]

[5] On July 12, 2006, Rosemark filed a Motion for Appellate Attorney fees. The Motion requested "that the Court order that this matter be remanded to the Trial Court for determination of Rosemark Homes'

SHARPNACK, J., and MATHIAS, J., concur.

appellate attorney fees after the Court of Appeals has ruled on the appeal of this matter." Rosemark failed to specify whether the requested fees were for the first or second appeal. Our court held the motion in abeyance to be decided by this panel after the case was fully briefed. Because we remand for the trial court to determine the amount, if any, of attorney fees warranted for the 2003 (first) appeal, we direct this motion be referred to the trial court as well. The trial court should not award Rosemark fees for the cross-appeal and, indeed, should consider awarding the LaForests the costs that they incurred in defending it.